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SOME PROBLEMS OF FAIR COMPETITION.

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I.

TO say "fair competition," is, according to some people, nothing more nor less than to say "fair brigandage." To discuss the ethical problems which competition raises is in their estimation on a par with the attempt (which to-day is made only for children) to attach a halo to the head of Robin Hood. Business competition, they say, is in its essential nature nothing but war. It may be correctly represented by two kings marshalling their forces to seize each other's territory; or, if you prefer, by two dogs fighting for a bone. Always and everywhere it is the attempt to gain through the loss of another. To talk about applying the principles of morality to this brutal struggle is to talk nonsense. For morality involves precisely a regard for the interests of other human beings, and a consequent willingness to be satisfied with less than one has power to seize. Competition says: "Thou shalt starve ere I want"; whereas morality says: "All men are brothers, and should treat each other as such."

This description of business competition may seem plausible at a casual glance. But a square look will show that it distorts fundamental facts. War involves two parties, one of whom can gain, if he succeeds in gaining at all, only at the expense of the other. But business competition cannot be represented by less than three parties, two competitors and a prospective purchaser. Business competition is the concurrent offering to this third party

Vol. XXXI—No 2.

of services or other goods on the part of the competitors, as a result of which the former accepts the offer most favorable to himself and is in so far better served. Business competition is thus competition for the opportunity to serve. This is equally true whatever may be the motives involved. In fair competition that person gains the opportunity to serve who really makes the better offer. In return he receives the reward. The loss of the second competitor is thus only indirectly due to the action of his rival. It is due primarily to the act of the purchaser in choosing what he regards as the better alternative in preference to the poorer. No wrong is thereby done the rejected competitor unless it is the duty of the purchaser to choose the less advantage rather than the greater. It is impossible to see how this can be the case under any but exceptional circumstances. But if such a bizarre theory of duty is to be maintained, then we must insist that it is the customer, not the successful competitor who is primarily at fault.

Accordingly if there is anything essentially immoral about competition it must lie not in the relation between competitor and competitor but in the relation between the purchaser and the competitors. This relation, it is obvious, may take a number of forms. Instead of waiting for the competitors to come to him the would-be purchaser may go out actively in search of them (shopping). He may inform one man of the offer of another, in order to obtain better terms than the former would have offered him spontaneously. He may refuse to buy at the terms offered, preferring either to wait for future opportunities, or if the article be not a necessity for him, not to purchase at all. This is what is called "the higgling of the market." It must be carefully noted that apart from the use of intimidation and deceit, all bargaining consists essentially in some one of the above modes of activity.

Is there, then, anything essentially immoral in actions of this sort? It is impossible to see how they differ in kind from accepting the best offer thrown without any effort

on one's own part into one's lap. It is true that when the transaction is consummated the customer may have paid less than he would have been willing to give if he had been compelled to choose between a higher price and not purchasing at all. It is equally true that the successful competitor might have been willing to sell at a lower price than that at which he actually sold, if he had been compelled to choose between selling at a lower price and not selling at all. But whether this unwillingness on the part of one or the other factor in the agreement was morally unjustified or not depends entirely upon what constitutes a "fair price" in the premises. The bargainer may have been trying to "overcharge"; or the would-be purchaser to pay less than the goods or services were "worth." In either case the party threatened with injustice is obviously entitled to get better terms if he can. In cases of overcharging and underpaying alike, however, the wrong is not inherent in the competitive system as such, but is due to that spirit of selfishness which wherever it exists will in any conceivable economic system get the most for itself at the least cost that circumstances permit.¹

In so far as an economic system fails to secure the distribution of goods at a fair price it is of course imperfect. It is equally imperfect if it fails to raise the production of goods to the maximum desirable. Production is just as much a moral issue as is distribution. As far as the individual is concerned his failure to do his part to increase the world's store of goods is just as truly an exhibition of selfishness as is his refusal to part with goods once created except at an extortionate price. An economic system, accordingly, must solve two problems, that of production and that of distribution; and if by any chance the full attainment of one end should prove to be incompatible with the full attainment of the other it must make the most satisfactory compromise that conditions at the time per-

¹ It may be said that the socialistic system makes it possible to determine what is a fair price, while a competitive system does not. I have dealt with this point, by inference at least, in an article in this JOURNAL, Volume XXX, page 372, entitled, *The Problem of a Fair Wage*.

mit. If then it could be shown that the system of pure competition (which, as Mill and others have pointed out, does not exist to-day and probably never has existed, at least on a large scale) solves more satisfactorily, in the long run, than any other attainable system, the double problem of production and distribution, the fundamental objection to competition as inherently immoral would fall to the ground.

Whether on the whole competition does work better than any other system which it would be possible to introduce and keep going is a question I do not mean to consider in this paper. I wish rather to discuss some important corollaries that flow from giving it an affirmative answer.

What, we shall inquire, will be the attitude of a man who accepts the affirmative answer and who also is permeated through and through with a love of his fellow men? Obviously he will wish the competitive system to continue. If such a man enters business he will give his customers the best service of which he is capable, and he will take the rewards that come to him as a result of his success in offering better services than his competitors—and he will take these rewards with a good conscience, just as he will approve of anyone else accepting such rewards under the same circumstances. In every day business life the economic motive is indeed very frequently the mere selfish desire to get money. But a man who is guided by higher aims can without difficulty find a place for himself in the competitive system also, provided always that he believes that this system is on the whole the most satisfactory one at present available for supplying the economic wants of man.

The socialistic writers beg the whole question when they urge the antithesis, as they are constantly doing, between "a system of production which will be carried on for use and the present one which is carried on for profit."¹ Where the producer is selfish and lazy he will, under any régime, competitive or socialistic, do the poorest kind and the

¹ See H. W. Laidler, *Socialism in Thought and Action*, p. 123 and *passim*.

smallest amount of work he can possibly "get away with." Where he is selfish and ambitious he will shape all his work so as to make the best possible show, and appearance will coalesce with reality only by accident. In either case, he will, whether alone or in co-operation with others, demand just as large a return for his services as he thinks he can possibly get, and will not hesitate to squeeze the orange for the last drop of juice. The socialists seem to suppose that under their régime "practically all incomes would have the form of salaries for services rendered the community by the individual; and the different amount of those salaries would be determined by the collective judgment of the community, expressing itself through the organs of legislature and administration." But to suppose that any given economic group, as the coal miners, will peacefully accept whatever wages "the collective judgment of the community" decides to assign them, when by "direct action" or any other kind of action they can obtain more, is to suppose the magical disappearance in socialistic society of that spirit of selfishness which is precisely the thing that gives its evil character to our own.

Essentially the same criticism can be urged against the socialistic talk about "replacing competition with co-operation." Co-operation may be a name for a purely external relationship, for the mere fact that, from whatever motive, one man helps another in the attainment of his ends. This form of co-operation obtains to-day between the customer and the competitors. All the latter are more than ready to serve him, and the one selected actually does so. But if co-operation means an inner spirit it may be just as wanting in a socialistic society as it often is to-day under competition. The co-operator, in other words, may have his eyes fixed singly upon what there is in it for him. In either system, then, the selfish and the unselfish man will act each after his kind. There is thus as much room in the competitive system for the good man and honorable service as there is in the socialistic for the bad man and eye service. And in both systems alike the bad man will look for the grafter's or the bully's pay.

There may be such a thing, then, as fair competition. As competition has two aspects, so a completely fair system would involve right relations, first between competitor and competitor, and second between buyer and seller. The two relationships are commonly inseparable. As far as a distinction is possible, however, this paper confines itself to the first. As between competitors competition is fair when each would-be seller seeks success solely by offering better service (including terms) than does his competitor. Competition is unfair when success is sought in any other way.

II.

This conception of the nature of competition and the distinction between fair and unfair competition supplies a complete justification of the code of morality traditionally acknowledged to be binding as between business men. It manifestly excludes the use of violence, intimidation in the sense of a threat to inflict a wrongful injury upon another, deceit, the making of certain contracts, and the breaking of most others. A study of the traditional code of fair competition would raise many interesting, important, and perplexing questions. But I do not mean in this paper to undertake this task, but rather to employ our definition for an appraisal of certain methods of competition which till within perhaps the last two or three decades passed largely without condemnation on the part of the general public, but which nevertheless are responsible to a very considerable degree for the total rejection of competition as a system on the part of certain high-minded but all too hasty critics. The most important of these practices may be included under the name of predatory competition. By this is meant the direct attempt to cripple or destroy the business of a competitor by the device of selling one's goods below cost.

Predatory competition includes what is called local price cutting. This is a practice open only to corporations doing a business over a large territory. It consists in selling below cost in one locality where competition is keen, and

at a correspondingly higher price where competition is either non-existent or comparatively innocuous. But local price cutting, we must be careful to note, is only one form of predatory competition, although the most common one. Whatever and wherever an organization may sell, and whatever may be the means by which it plans to recoup its losses, the essence of the act is always the same. It is the selling of one's goods (whether a single line or all lines) at such a price as would if continued lead to the seller's own bankruptcy, with a view to ruining a rival or at least driving him out of some particular field.

The wrongfulness of such action follows directly from our definition of fair competition. Having said this it might seem as if all we need do were to rest our case upon the correctness and adequacy of our definition. But the practice in question has vigorous defenders; and what is more important, is at present widely and severely condemned by public opinion and forbidden by law only under certain conditions, and for reasons extraneous to the act itself. So that in the interests of clear thinking in morals and consistent action in law both the arguments by which it is defended and those by which it is commonly condemned need to be examined with some care.

The common view seems to be that predatory competition is not wrong *per se*, but only when it is practiced by the "trusts" or other very large corporations in an attempt to monopolize the trade of a certain territory or of the nation as a whole. Certainly it is placed under the ban of the law only when this condition applies. The position that it is wrong as between large concerns while quite innocent between smaller ones has been vigorously attacked by Mr. G. H. Montague.¹ He takes the position that it is always and everywhere justifiable. The essential feature of his defense is the assertion that we cannot have one code for large businesses and another for small ones. He further alleges that selling below cost lowers the price to the consumer and is for this reason "the most innocent

¹ The *Atlantic Monthly*, Volume 95, p. 414 (1905).

mode of competition conceivable." Finally there runs through his paper as through most of the literature in advocacy of this practice the intimation, which with some writers appears as bald assertion, that this kind of a struggle contributes in the long run to economic progress because it leads to "the survival of the fittest." Thus, it is supposed, do things present and things to come all work together for good.

The plea of lower prices need not detain us for more than an instant. When a "trust" lowers prices below the cost of doing business in one locality it takes pains to recoup itself amply in some other district. If it is not able to do so in any other place it will do it in the same locality at a later time when its battle has been won and its competitors killed off. In fact it ordinarily does both.

The "survival of the fittest" is a catch phrase that has been used now for more than a generation in the discussion of social problems by a lot of people who are apparently unaware that the term is primarily a technical term in biology, bearing a highly specialized meaning which is quite different from the sense in which it is commonly used in the discussion of current social problems. In the economic world the fittest are those best fitted to do the world's work; they are the fittest to serve. The survivors of predatory competition are likely to be those possessing the longest purse. But the possessors of the longest purse are not necessarily the fittest. Fitness for the industrial world includes intellectual ability, willingness and power to work, and character, in addition to financial resources. But financial resources often stand for nothing but luck, for luck plays at least as large a part in business success as the cards do in determining success in an evening's game of whist. Sometimes the luck consists only in the fact that one happens to have been the first on the ground, as in the exploitation of much of the natural wealth of this country. Once more, financial resources may mean nothing more than a rich father, or father-in-law. Inherited wealth is playing an increasingly large rôle in the business

world as we approach nearer to European business conditions. Finally, they may mean merely length of time that one has been in business. The defeated competitor may be a young man at present without any large amount of capital, but possessing ability and energy which would have insured him ultimately an adequate supply if he had not been crushed before he got a good start, and which would have made of him an efficient factor in productive industry. The possession of a long purse, therefore, is by no means the necessary concomitant of the personal qualities which fit men for a useful business life.

Where there is a real disparity in economic fitness between competitors, this fact will in the course of time demonstrate itself through the ordinary processes of fair competition. In the long run, for the most part, customers will go, if they are permitted to do so, where it is to their interest to go. Predatory competition therefore is not needed to separate the economic chaff from the wheat; the normal processes of industrial life will attend to that.

Mr. Montague argues that mere size cannot make a difference in a matter of right and wrong; that accordingly if predatory competition is fair (as is commonly admitted) between small units, it must be equally allowable in the hands of larger units. But this assertion (which is not above suspicion as a piece of logic) has a double edge. For we might accept it wholeheartedly and draw from it the conclusion that predatory competition is not justifiable as a weapon in the hands of any business organization, large or small. As against Mr. Montague and the man on the street alike, we must insist that as a matter of fact this is the only position which is compatible at once with those traditional standards of morality which all parties to the controversy profess to accept, and with an analysis of competition which succeeds in differentiating it from brigandage. The fundamental principle of traditional morality, both as incorporated in law and in any consistently worked out code of private morals is: So use your own as not to injure another's. The fundamental principle of fair com-

petition, as revealed by a direct analysis of the competitive system itself, is that competition is fair in so far and only in so far as success is determined by superiority of service. Both roads lead to precisely the same terminus.

We must, then, I believe, take issue not merely with those who like Mr. Montague claim that predatory competition is right for big business because it is right for small, but also with those who assert that although wrong for big business it is right for small. In opposition to this view I should claim that it follows from the very nature of fair competition that the direct attempt to ruin a competitor is, as such wrong, and its wrongfulness is therefore independent of the amount of the financial resources of either party. Predatory competition is indeed more dangerous in the hands of a big corporation than it is in the hands of a small retailer because (among other reasons) it is more likely to succeed in attaining its ends. But, to paraphrase a famous line, not success but low aim is crime. The wanton destruction of an efficient economic factor is always and everywhere a loss to society, for never has there been an over-supply of this kind of commodity. And as far as the victim himself is concerned, ruin always feels like ruin, whether a man's loss be little or much.¹

It should go without saying that selling below cost in order to market goods which cannot be got rid of under more favorable conditions, or in order to keep a factory running in an "off period," cannot be classed as predatory competition. The same may be said for selling below cost or giving away goods for advertising purposes, where this is the real motive and where it therefore alone determines the amount of money expended, the conditions under which it is done, etc. Under certain circumstances other people may find it difficult to say whether a given business house is, in so doing, laying itself open to the

¹ It follows from the preceding that in essence this form of competition was as wrong a century ago as it is to-day, even though the mischief done may not have been sufficiently great to attract general attention. The opposite position is taken in a valuable article in this JOURNAL, *The Morals of Monopoly and Competition*, by Professor H. B. Reed, Volume XXVI, p. 258 (1916).

charge of predatory competition or not, but those in control know. And if there are some transition cases here which are difficult even for those immediately concerned to judge, this is no more than what happens in every department of conduct.

We may if we choose subsume our conclusion under the ancient provision of the Eighth Commandment, and thus place it under the ægis of our traditional morality. Viewed in one light a business may properly be regarded as a piece of property. If successful it certainly has a money value which may be sold as "good will." Therefore it may not be destroyed directly in the pursuit of merely selfish ends any more than may a farmer's orchard. If the fruit trees fail to bear fruit, the owner can blame no one but himself. The same is true if a business withers away because an insufficient number of persons care to avail themselves of the services it offers. But the active direct destruction of the one is on precisely the same moral plane as the direct destruction of the other.

III.

A thoroughgoing and consistent application of the foregoing principles to economic life will produce a profound change in the ordinary conceptions of business morality. The common view is that a man has a right to adopt any selling (or buying) policy he chooses. He may sell at any price he wishes, to any one he wishes, on any terms he wishes, and he may withhold in such measure and at such times and under such conditions as he wishes. "May not a man" it is asked "do what he wills with his own?" The answer is a counter-question. May a man run his own automobile down a city street at forty miles an hour? Or from the window of his own house, shoot with his own revolver at random in the direction of his neighbor's yard? Or build a wooden house on his own land within the fire limits established by the proper authorities? The reason for these and like restrictions is always the same: A man may not for the sake merely of his own pleasure or

profit injure his neighbor, or even subject him or his to unnecessary risk. Why should not the principle which beyond controversy holds for the use of one's property apply equally to the conduct of one's business?

A farther study of this principle, so as to include the rest of its leading applications to the problems of sale and purchase, will clarify its meaning and indicate its significance for the conduct of business life. We may begin with the practice of inserting what are called "tying clauses" into contracts of sale; a practice which is generally known as the formation of factor's agreements. There are two leading varieties. The first consists in the refusal to sell except on condition that the purchaser agrees to supply his needs, either in some one line or in all the lines which the organization markets, exclusively from the one source. The second consists in charging the customer a higher price than his competitors are charged unless he engages to make all his purchases, whether in one line or in all lines (as the case may be), from the one organization.¹

The power to force such agreements depends upon the existence of a monopoly or quasi-monopoly in some one line or group of lines. Thus the General Electric Company purchased from the foreign patentees the exclusive right to the manufacture and sale in the United States of tungsten and tantalum electric lamps. Because of the demand for these lamps the retailer was as good as compelled to carry them. If he did not do so, his customers, after the fashion of customers, would have turned their backs upon his store in disgust. Hence the company was able to force its carbon filament lamps upon the retailer, regardless of whether they were the most satisfactory available in quality and price or not. This monopoly was thus based upon patent rights. Sometimes the power to force goods down

¹ These agreements take a large number of special forms, which for the sake of keeping the fundamental principle in the center of attention, I have ignored in the preceding statement. For the details see W. H. S. Stevens, *Unfair Competition*, Chapters IV, V, VII; also the Report of the Commissioner of Corporations, March 15, 1915: *Trust Laws and Unfair Competition*, pp. 319-322.

the throat of a wholesaler or retailer depends upon the ability to produce some line or lines so much of a favorite among consumers as to be the object of an insistent and extensive demand. The favor of the consumer may be due to nothing but widespread advertising, or it may have its source in some particular quality which the other manufacturers are unable to duplicate. The ability of the American Tobacco Company to force a "full line" upon unwilling retailers has had its source in these facts.

The evils of this practice are numerous and manifest. It destroys the chances of producers who, apart from the control of some specialty, may be as efficient as, or more efficient than those who thus seize their business; it prevents retailers who wish to serve as agents for different parties from doing so except under conditions which are practically prohibitive, and is thus a form of coercion; most serious of all, it limits the field of choice for the ultimate consumer and thus directly destroys the open market. In fair competition goods are sold on their merits. In this practice the goods of competitors are beaten and driven from the market not because of their inferiority but because of some specialty by means of which the possessor screens the inferiority of his other products or the unreasonableness of his prices.

The nature of the arguments urged in defense of this system may be seen from the following quotation.¹ "Factor's agreements are another phase of the modern wholesaler's endeavor to take into his own hands control of the whole process of distribution in order to protect himself against inefficient, unscrupulous, or unenthusiastic retailers. Such a contract assures the seller of wholehearted 'pushing' of his goods by the retailer, while at the same time it effectually limits the field in which the wholesaler must meet the competition of his rivals." In the above trinity "unscrupulous" is given a place evidently for the sake of its effect in raising the tone of the argument to a high level. Why a man who sells, let us say, a kodak

¹ 30 Harvard Law Review 72.

camera made by the Eastman Company, and the photographic paper made by a rival should be any more unscrupulous in his dealings with the Eastman Company than a man who sells what he regards as an inferior paper solely because he must do so or get out of business, is a mystery which no special pleader has yet succeeded in explaining. Why such a retailer should be less efficient or less enthusiastic about selling a kodak camera which he has bought because he believes it to be the best thing of its kind in the market, is also past comprehension. What really counts in this defense is the last sentence: "It effectually limits the field" etc. This precisely is its condemnation.

If it be asked what is the difference between forcing a retailer to sign a factor's agreement and setting up an exclusive agency for the sale of one's own goods, the answer is that there are a number of obvious differences, the most of which were, in effect, enumerated just above. Confining our discussion to the unfairness of which the retailer or other distributor is a victim the chief difference between the two modes of doing business is that, as has been already pointed out, the factor's agreement is the product of force. The retailer is thereby compelled to carry certain goods which he does not wish to carry and to refrain from carrying others which he wishes to be in a position to sell. If the retailer carried the goods of a single producer on his own volition there would of course be no point in compelling him to sign an agreement to that effect. In fact many a dealer has fought against this constraint for months and yielded in the end only because he has found himself placed before the alternatives of surrendering his freedom of choice or going into bankruptcy.

There are other differences between the establishment of an agency and the demand for a factor's agreement. An exclusive agency is plainly marked as such; he who enters the shop knows beforehand what he is doing. The retailer doing business under a factor's agreement is supposed by the public to be not an exclusive agent but one who picks from the open market what he regards as the best it has to

offer. Finally in the agency, properly so called, the obligations are mutual as between agent and principal. The principal supplies the capital and carries the agency in bad times as well as good; in the factor's agreement the man who is forced to serve as agent carries all the risks himself. If he fails the company loses nothing, but throws him away like used tea leaves and finds someone else to put in his place.

The second form of factor's agreements may be defined in two different ways. It may be said to consist in offering the retailer a special rebate on all goods purchased provided he agrees not to purchase from a rival. Or it may be described as charging the retailer a higher price than his competitors are charged unless he signs an exclusive contract. Obviously these are but two ways of saying the same thing. The Madison Gas and Electric Company has a series of charges for its products and allows its customers a rebate if they pay their bills before a certain date. Whether by this arrangement the consumer is getting a rebate, or whether he is simply being penalized for not paying his bills on time is a matter really not worth discussing. The business man who is forced to choose between buying superior goods elsewhere and accepting a "rebate" knows that if he is to remain in business his prices must be approximately those of his competitors. The original price apart from the rebate may easily be placed at such a point, and often has been (and probably is being to-day) placed at such a point that while he is quite at liberty to buy or not as he chooses he cannot possibly sell if he does any of his buying elsewhere. And where the discrimination against him is not so excessive it may still be enough to make the difference between floating and sinking.

At first glance, to be sure, this form of factor's agreement seems to be merely one application of the principle on which all wholesale trade is based. But there is an important difference. Wholesale rates are based upon the amount you buy from a given firm; the rebates under discussion are based upon what you buy from other people. In other

words they are not based upon the actual amounts purchased from the firm granting the rebate, but upon whether you have bought any amount whatever from its competitors. The granting of wholesale rates is legitimate because, for reasons too well known to require mention, conducive to healthy business conditions; the granting of the latter is illegitimate because the aim is precisely the same as in the demand for exclusive agreements, *viz.*, to strangle competition and destroy the open market.

The factor's agreement, we see, aims to cripple or destroy a competitor by illegitimately inducing or forcing people not to buy from him. The next method of unfair competition which we shall consider is the attempt to reach the same end by inducing other parties, whether by offering rewards or threatening penalties, not to sell to him.

This practice may take many forms. Some years ago, in a certain Minnesota city, the owner of a department store who was also a banker, succeeded in preventing the proprietor of a rival store from getting a loan not merely from the bank of which he was the president of the board of directors, but also from every other bank of the city. The credit of the rival was excellent, and his security in itself perfectly satisfactory. The other banks simply did not dare offend a man with great prestige by serving a man with little or none.¹

A man or a company or an association of individuals may thus attempt to ruin a competitor by barring him from the sources of credit. The same end may be sought by hiring manufacturers not to supply him with machinery or goods of whatever sort that are essential to the prosecution of his business;² or by threatening to boycott those who sell to him.³ After what has been said the wrongfulness of these practices needs no discussion.

¹ A somewhat similar case will be found in *Trust Laws and Unfair Competition*, p. 328.

² *Ibid.* pp. 328, 329; Stevens, *op. cit.*, Chapter VIII.

³ A case famous in the history of law is that of the Scottish Co-operative Wholesale Society *v.* The Glasgow Fleshers' Trade Defense Association. It may be found in 5 Scottish Law Times 263, or 35 Scottish Law Reporter 645.

In the preceding cases the wrongful actions consisted in inducing third parties not to sell or to buy from one's competitor. We turn now to the refusal to supply a competitor with what is needful for the conduct of his business. The problem is something of a paradox. It will ordinarily be of no practical significance except as he from whom the sale is demanded is the possessor of a monopoly. On the other hand in this event the problem will in most instances lose its importance for practice, in that the courts will compel the monopolist to serve, and since both parties are perfectly aware of this fact the question will seldom arise. Suppose, for example, that the owner of a store happens to be the owner of the town's electric lighting plant. Upon his first threat to cut off the supply of electrical current from the store of a rival the latter could apply to a court and could secure an order for service on the ground that the supplying of electricity is a "business affected with a public interest." While these considerations rob the problem of most of its practical importance, they render it one of the greatest interest for the theory of business morality. For they show that a certain very significant conception of ethics has so far become common property that the courts, which are apt to lag behind at least the more advanced portions of public opinion, regard it as beyond the range of controversy. This conception is that when a person sets out to supply a community with necessities and the community is really dependent upon him he is morally bound to serve all alike who have the money to make the proper return, including his rivals in business. The state has no right to compel a man to do that which it was not his duty to do without compulsion. If the compulsion which it exercises is justified in this instance, this means that the duty was there in the first place.

That this fundamental conception of the common law is a correct one is an immediate corollary from our definition of fair competition. You may not injure another in the pursuit of your own selfish ends—there is no provision here for exceptions in the matter of rivals, If it be replied

that you do not injure when you merely withhold service, this is mere quibbling, at least as far as the problem immediately before us is concerned. The Austrian peasants, according to the reports in the newspapers, are withholding their grain and vegetables from Vienna, not because the Viennese cannot pay, but because the Viennese are socialists and free thinkers, and the peasants are seizing this opportunity to promote the destruction of what they regard as the unfit. They are, to be sure, merely refusing a service. But since modern man can live only by the interchange of services, they are as truly (as far as their own attitude is concerned) killing their fellow countrymen in the once great city on the Danube as if they had brought in a number of batteries of machine guns and mowed them down with cold lead.

The other side of the refusal to sell is the refusal to buy. In the case of a competitor this ordinarily takes the form of joining with fellow-members of a trade organization to boycott one who supplies them with goods and at the same time sells to their customers. A boycott of this sort is usually directed against a manufacturer, who, passing over the head of the wholesaler, sells directly to the retailers or even to consumers, or a wholesaler who deals with consumers. The boycott is a weapon by which it is sought to kill this form of competition. To understand the problem it must be premised that the boycotting organizations normally regard themselves as simply protecting their own rights, invaded by the unfair competition of the manufacturer or the wholesaler. The annual report of the board of directors of the New Jersey Lumbermen's Protective Association, submitted Feb. 26, 1907, contained the following passage: "It is wrong in principle for the wholesaler or the manufacturer, as we have always contended, to become active competitors of their own customers, the retailers."¹ This statement raises a counter problem: Can a claim of this kind be accepted?

The answer seems to me to be clear. One of the most

¹ *Trust Laws and Unfair Competition*, p. 330.

serious features of the competitive system as it exists to-day is its wastefulness. The farmer and the manufacturer get but a small share of the cost which the consumer pays. This is, in part at least, due to the participation of too many intermediaries in the process of distribution. In some fields the middleman undoubtedly has a place. Just where this is can usually be determined best by experience. From the point of view of this paper, therefore, the experiment should be allowed to continue without hindrance. If the middleman is really needed he cannot be displaced. If he is not needed he ought to be. In the latter case those who through a boycott seek to prevent this consummation are doing the same kind of a wrong as that of the working men who—with precisely the same provocation—smash the newly invented machinery which they believe will “steal” their jobs from them.

This may perhaps seem a hard saying. Nor will one who has never been subjected to such a temptation wrap about himself the cloak of a Pharisaic self-righteousness and thank God that he is not as other men. But however much allowance we may be disposed to make in judging the wholesaler or retailer who sees his business threatened with ruin through the introduction of more economical methods; however much allowance we may make for the working man who meets a similar crisis in his life by sabotage, the fact remains that if they are fighting against the coming in of a better economic order they are doing wrong. The courts are therefore bound to interpose their veto; and those persons, at least, whose interests are not directly involved must recognize that the repression exercised by the state is essentially just.

The fundamental principle of fair competition is: Let the best man win. The tendency of our selfish nature is to say: Let me win, whether I am the best man or not. When it dares to be consistent this spirit will lead a man to commit murder if this is the most effective way of getting rid of a rival. Such a man of course represents the worst type because he will go to any length in order to win. But

just as certainly as such a man stands at the bottom of the moral scale, just so certainly does he stand at the top who, however insistent the temptation, wills from start to finish to play the game according to the rules, and whatever happens acts on a level with the standard: Let the best man, the best goods, and the best methods of doing business win.

We have not however finished our study of the boycott against the middleman who jumps one of the recognized economic steps in order to widen the market for his goods. Suppose, for the sake of argument, it could be demonstrated, not by the slowly moving and ambiguous test of experience, but let us say by the reason of the economist, that for some particular trade the middleman is a necessity; and that the retailers or consumers who, when their personal interests dictate buy over his head, and when these same interests lead in the opposite direction run to him for goods or service, are in reality playing the sponge, in that they are leaving to others the burden of supporting an institution which in the last resort is alike indispensable for all. In this case would the middlemen be justified in boycotting any one who consents to be a party to the transaction?

We have asserted a duty to guide our buying and selling policies by considerations which take us out of the area of whim, prejudice, and antipathy, and which may at times call us to rise above the demands of economic self-interest. But it is obvious such a duty cannot be unconditional. No one is required (under ordinary circumstances) to sell goods to a firm whose credit is shaky. A fire insurance company ought not to be expected to insure the property of a man whom it suspects of arson. A business man, in other words, has the right to serve himself in serving others just as far as does not conflict with larger interests. Accordingly he certainly is not obliged to sell his goods to or buy goods from one who is injuring his interests by a policy which represents no contribution to the public good. Accordingly under the conditions imagined a boycott to protect the existence of one's business would be justifiable.

By the admission of this exception to the rule which we have been endeavoring to maintain we may seem to have opened the door to everything to which it was closed. If a man may in self-defense consult the interests of his own business in determining his buying or selling policy where is this concession to end? Every business man finds himself surrounded on all sides by eager, vigorous competitors. Even if they are obeying the laws of fair competition they are striving with all their might to get trade away from him, and this means that they are doing that which if they could always win would ruin his business. Some of them may be small now, and their competition of no particular significance. But who can tell when a man of exceptional ability and energy will arise from amongst them, or when some one of them will obtain, perhaps from an outsider, a large accession to his capital? Who can tell whether one of his more powerful rivals is not working on a plan which when carried out will lose him every one of his customers? Therefore if self-defense is a legitimate excuse for a buying or selling policy aimed at a rival, why not start a "preventive war?" why not kill the rival now while one has a chance? "I have put for a general inclination of all mankind," writes Thomas Hobbes, "a perpetual and restless desire of power after power that ceaseth only in death. And the cause of this is not always that a man hopes for a more intensive delight than he has already attained to, or that he cannot be content with a moderate power; but because he cannot assure the power and means to live well, which he hath present, without the acquisition of more."¹

The answer to this objection seems simple in principle, however great the difficulties that it may sometimes raise in practice. Unless we are going to accept the creed of a Tolstoi we must allow that a man may defend himself against wrong, at least where the matter is beyond the jurisdiction of the courts. Certainly he is not called upon to play into the hands of those who are seeking illegitimately

¹ *Leviathan*, Chapter XI.

to injure him. But from this it does not follow that he may ruin or in any way injure his competitors because of the fear that they may some day succeed through better service in attracting his customers away from him. It is of the very essence of the competitive system that none of its members can ever feel absolutely secure in his position. One of the chief arguments in its favor, as against socialism, is that, human nature being what it is, no large body of men can be trusted to live on Safety Street. Many or most of them would, it is believed, grow slothful, careless, indifferent, perhaps overbearing or downright oppressive. As was said of a famous piece of bacon, we must take the lean with the fat. We have no right to go to any length to secure perfect safety for our own business while denying, in the name of the competitive system, this right to everyone else.

The right so to guide our buying and selling policies as to protect our own legitimate business interests, as the term legitimate has been defined in this paper, cannot be denied because it is subject to abuse. The recognition of this right undoubtedly opens a door to grave aberrations because of the tendency of human beings to look with partial eyes at situations in which their own interests are vitally concerned. But there are no "fool proof" and no "rascal proof" principles of morality. He who expects the moralist to produce them is asking for a medicine that if taken as prescribed on the bottle will cure all physical ills.

If there is any truth in the contentions of this paper it is more important that they should be heard and heeded to-day than at any time since the rise of the modern economic system. "We in Europe know," the British ambassador to the United States recently said, "that an age is dying." If we in this country do not realize what this means, we shall have an opportunity to do so before very long. It means that the age of unquestioned privilege is disappearing, alike in the economic and the political field. For a century or more the chief beneficiaries of the competitive

system have been assuring their less favored brethren that all is for the best in the best possible of economic worlds. These less favored brethren are now proposing to examine the situation for themselves. If they decide this doctrine is untrue they will unquestionably turn upside down the existing order. Those who believe in the competitive system should therefore see to it that it is shorn as quickly as possible of all excrescences, for in the eyes of prejudice the bad will always obscure the good. It is submitted that the practices condemned in this paper represent in sober truth a real excrescence. They cannot be justified by the same criterion by which we have sought to justify what we have called fair competition; they are for the most part easily separable from those methods of buying and selling which we have tried to exhibit as legitimate; they could not exist for a moment except as parasites upon an economic body to whose normal processes they are utterly foreign. With the attitude of the European worker what it is, and the probability that the attitude of the European worker of to-day will be that of the American worker within a generation, it is essential that our courts, our legislative bodies, and public opinion as a whole should learn to distinguish between what is fair and what is foul in our present competitive system; and having learned, should act. In particular, if "our captains of industry" and the men who make, interpret, and enforce our laws repeat the stupid mistakes of those who surrounded the late Czar Nicholas in the opening years of the Twentieth Century a not dissimilar fate may fall upon them, and upon us.

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